MOTION FILED
NOV 20 1998

(4)

No. 98-534

In The

Supreme Court of the United States

October Term, 1998

PATRICK BRADY and SHAWN MURPHY,

Petitioners,

v.

STEVERSON DAVIS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF THE MICHIGAN MUNICIPAL LEAGUE IN SUPPORT OF PETITIONERS

SUZANNE CAROL SCHUELKE, ESQ.
15703 Stonehouse Circle
Livonia, MI 48154
(734) 462-4284
Counsel of Record for Amicus Curiae Michigan Municipal League

PATRICK LEVINE ROSE, ESQ.
230 N. Washington Sq., Suite 306
Lansing, MI 48933
(517) 482-2422
Co-Counsel for Amicus Curiae Michigan Municipal League

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

32 pp

QUESTIONS PRESENTED

The Defendants have filed a Petition for a Writ of Certiorari raising the three Questions repeated below.

Question #1: Whether the Fourteenth Amendment's Due Process Clause imposes upon city police officers who arrest a man for destruction of property belonging to a homeless shelter and then transport him to another location, a duty to protect that person from injury by third persons after the officers have released the man from custody, where the reason for releasing the man from custody at another location was that the county jail would not accept him because it was overcrowded, and the arrested person stated that if released at the jail he would return to the homeless shelter and destroy more of its property?

Question #2: Whether the Court Below erred when it evaluated the question whether a claim had been stated under 42 U.S.C. 1983 for violation of the Fourteenth Amendment's substantive Due Process guarantees using a "deliberate indifference" standard, rather than the "shocks the conscience" standard which this Court established in *County of Sacramento v. Lewis* [___ U.S. ___, 118 S. Ct. 1708, 140 L. Ed. 2d 1043] (May 28, 1998), where the claim is made against police officers who arrested an intoxicated man for property destruction and then released him on the side of a road because the jail was overcrowded and could not accept the man, and, where after the man's release, he was struck and injured by a car driven by a third person?

QUESTIONS PRESENTED – Continued

Question #3: [Note: Petitioner [has also] reserve[d] the right to argue Question 3 in the event certiorari is granted on the above questions, but does not include Question 3 among the reasons for the grant of certiorari.] Whether the courts below erred in denying police officers claims for qualified immunity in a case under 42 U.S.C. 1983 alleging a substantive Due Process violation, when the courts below held that in November 1994 police officers had a clearly established Constitutional obligation not to do anything to increase the danger of an intoxicated person to injury from third persons when they move him to another location to prevent the commission of a crime and release him from custody there?

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE MICHIGAN MUNICIPAL LEAGUE IN SUPPORT OF PETITIONERS

1. Your Amicus Curiae is the Michigan Municipal League and its Defense Fund. (Hereinafter: "the League" or "Municipal League.")[1] The Respondent's counsel, George Hamo, denied consent to permit the filing of this Amicus Brief, while the Petitioner's counsel granted consent to file the Brief. The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 512 Michigan cities and villages of which 380 of these municipalities are also members of the Michigan Municipal League Legal Defense Fund.

2. The Michigan Municipal League operates the Legal Defense Fund through a Board of Directors. The purpose of the Legal Defense Fund is to represent the member cities and villages in litigation of statewide significance. The Board of Directors of the League authorized the preparation and filing of this Amicus Curiae Brief in order to insure that the interests of municipalities in Michigan, and the citizens (and taxpayers) whom they represent, are heard and understood by this Court.

3. The Board of Directors is composed of the President and Executive Director of the Michigan Municipal

---

[1] Rule 37.6 Statement: This Brief was written entirely by counsel for amicus, as listed on the cover. No outside contributions were made to the preparation of or submission of the text of this Amicus Brief.

League, as well as the Officers and Directors of the Michigan Association of Municipal Attorneys. These members represent both large, medium size and smaller communities located across the state, including City Attorneys from the following jurisdictions in Michigan: Philips A. Balkema, City Attorney for the City of Grand Rapids; Williams B. Beach, City Attorney for the City of Rockwood; John E. Beras, City Attorney for the City of Southfield; Harold Deason, City Attorney for the City of Grosse Pointe Park; Catherine R. Ginster, City Attorney for the City of Saginaw; Andrew J. Mulder, City Attorney for the City of Holland; Debra A. Walling, corporation counsel for the City of Dearborn; Eric D. Williams, City Attorney for the City of Big Rapids; and William C. Mathewson, General Counsel for the Michigan Municipal League.

4. The Municipal League files this Brief in support of the Petitioners and wishes to assist this Court in seeing the importance of this case to all citizens living in the State of Michigan. Those municipalities directly involved in the events that are the subject of this suit are the City of Flint, Genesee Township and Genesee County. These three municipal entities all had some direct involvement in the facts and circumstances that led to the release of Mr. Davis on a roadside outside of Flint, Michigan. Mr. Davis was taken by the Defendants to the Genesee County jail whose officials refused to house him as an inmate pending criminal charges. After the Defendants released Mr. Davis from custody, he was found by Genesee Township Police Officer Carlson in the middle of the road. Carlson talked to Davis before Davis was hit by a car.

5. Each of these three municipal jurisdictions have a strong interest in the outcome of this litigation, even though no government entity has been named as a party defendant by the Plaintiff in this case. All municipalities in Michigan will have to bear the burdens imposed by the decision to prevent the potentially unlimited, and completely unwarranted, constitutional liability created by the Sixth Circuit's Opinion.

6. Your Amicus seeks to show to this Court that the actions of the City of Flint police officers, of the Genesee Township police officer and of the County Sheriff at the jail were designed to protect the public from the Plaintiff's threatening conduct. The record does not reveal any unconstitutional conduct in the actions of the defendant police officers in failing to prevent the Plaintiff from being released from custody as a homeless man who must sleep in a public park.

7. Your Amicus party believes that, if the decision of the Sixth Circuit is allowed to stand, then it will require that all intoxicated persons must be treated by police officers as incompetent, and entitled to be kept (against their will) in the county jail until they are sober. This is a dramatic expansion of the role of the police in protecting intoxicated persons from harms they may create due to their own decision to become drunk. The only way to avoid this new responsibility to detoxify intoxicated persons taken into custody will be not to arrest them in the first place.

8. The Amicus Brief will seek to show why the police in municipalities in the Sixth Circuit and around the country are not following the rule of law adopted by

the Sixth Circuit below. This rule requires all intoxicated persons to be put under arrest to be kept in continued detention and protective custody until they are sober. If this is a constitutional obligation of police departments in Michigan and across the Sixth Circuit, then the decision below will impose huge costs on all municipalities.

9. Moreover, it is likely that the threat of this new liability will cause police departments across the nation to stop answering the public demand for some protection against the types of street disorder that contribute to the high crime rates in many inner city neighborhoods – and that is preventable. In this way, the decision below will frustrate legitimate law enforcement efforts to manage street disorder and the efforts of communities to stop crime.

10. Your Amicus will seek to show in the Brief why vacating the opinion of the Court below will allow police officers across the nation to continue to pursue legitimate crime-fighting strategies made unlawful by the decision below. The police should be allowed to arrest, move and then release suspects who are intoxicated without creating a duty to protect them from harm by third parties after their release from custody. Such policies are being followed by many municipalities and they should not be declared unconstitutional. Under the Sixth Circuit decision police officers who arrest such persons will have to place them in already overcrowded county jails, or to raise large amounts of tax revenue to expand the size of county jails, or to build medical facilities (e.g., such as detoxification clinics in a hospital).

For the foregoing reasons, your Amicus requests leave to file its brief.

Respectfully submitted:

SUZANNE CAROL SCHUELKE, ESQ.
15703 Stonehouse Circle
Livonia, MI 48154
(734) 462-4284
Counsel of Record for Amicus Curiae Michigan Municipal League

PATRICK L. ROSE, ESQ.
230 N. Washington Sq.
#306
Lansing, MI 48933
Co-Counsel for Amicus Curiae Michigan Municipal League

TABLE OF CONTENTS

Page

Questions Presented i

Motion for Leave to File Brief Amicus Curiae of the Michigan Municipal League in Support of the Petitioners 1-5

Statement of Reasons for Reversal 1

Opinion Below 2

Statement of Relevant Facts 2

Procedural Posture of the Case 2

Statement of Reasons for Reversal 3

Legal Argument I: The Court Failed to Apply the "Shocks the Conscience" Standard from *County of Sacramento v. Lewis*, As Required, to Measure Whether the Police Officers Violated A Constitutional Duty Owed to Protect the Plaintiff from Harm After His Release from Custody 3

Legal Argument II: The Court below Has Created a New, Unfunded Federal Mandate to Treat Intoxicated Suspects As Having a Constitutional Right to Continued Detention That Will Have Profound Budgetary Consequences, and This Mandate Invades the Sovereignty of the States 10

Legal Argument III: The Sixth Circuit Court Decision Will Prevent Municipalities from Relying upon Police Officers to Engage In Legitimate Law Enforcement Efforts to Detain and Move Intoxicated Persons Engaged in Disorderly Conduct, While Choosing Not to Incarcerate Them in a Jail After Their Arrest 14

TABLE OF CONTENTS – Continued

Page

Legal Argument IV: The Court below Did Not Properly Find That The Defendants Had No Qualified Immunity Because the Constitutional Duty Owed Was "Clearly Established" in 1994 16

Conclusion and Request for Relief 20

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Anderson v. Creighton, 483 U.S. 635, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987).....17, 18

Collins v. City of Harker Heights, 503 U.S. 115, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992)..... 8

County of Sacramento, et al. v. Lewis, et al., ___ U.S. ___, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (May 26, 1998).....2, 3, 4, 5, 6, 11, 20

Davis v. Brady, 143 F.3d 1021 (6th Cir. May 8, 1998) 2

DeShaney v. Winnebago Soc. Service, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989).....5, 8, 19

Estate of Scott B. Stevens v. City of Green Bay, 105 F.3d 1169 (7th Cir. 1997).....7, 17

Foy v. Berea, 58 F.3d 227 (6th Cir. 1995) 18

Gazette v. City of Pontiac, 41 F.3d 1061 (6th Cir. 1994)..... 18

Harlow v. Fitzgerald, 457 U.S. 800, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982) 17, 18

Humphrey v. Cady, 405 U.S. 504, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972)..... 7

Kneipp v. Tedder and City of Philadelphia, 95 F.3d 1199 (3d Cir. 1996) 9

O'Connor v. Donaldson, 422 U.S. 563, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975)..... 7

Rhodes v. Chapman, 452 U.S. 337, 101 S. Ct. 2392, 69 L. Ed. 2d 59 (1981)..... 13

TABLE OF AUTHORITIES – Continued

Page

Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997) 18

United States v. Lopez, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) 11

Walton v. City of Southfield, 995 F.2d 1331 (6th Cir. 1993) 18, 19

Youngberg v. Romeo, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982) 7

STATE CASES

Kent County Prosecutor, 428 Mich. 314, 409 N.W.2d 202 (1987) 13

Muskegon County Commissioners v. Circuit Judge, 188 Mich. App. 270, 469 N.W.2d 441 (1991) 14

FEDERAL COURT RULES AND STATUTES

Federal Rule of Appellate Procedure 28(j) 3

42 U.S.C. § 1983 ..... 17, 20

STATE STATUTES

County Jail Overcrowding Emergency Powers Act, M.C.L. 801.51 et seq., M.S.A. 28.1758(1) et seq. 13

COMMENTARIES AND TREATISES

William Bratton with Peter Knobler, *Turnaround: How Americas Top Cop Reversed the Crime Epidemic* (Random House 1998) 15

TABLE OF AUTHORITIES – Continued

Page

George Kellig and Catherine Colis, *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* (Free Press 1996) 15, 16

Malcolm Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed Americas Prisons* (Cambridge University Press 1998) 11

Michael L. Perlin, *Mental Disability Law: Civil and Criminal* (Lexis Law Pub. 1998) 6

Wayne Walsh, *Counties and Court: Jail Overcrowding and Court Ordered Reform* (Temple University Press, Philadephia 1995) 12

STATEMENT OF REASONS FOR REVERSAL

The questions set forth in the Petition are stated on page i preceding the Motion. The Amicus Curiae will address the following reasons for reversal:

Legal Argument I: The Court Failed to Apply the "Shocks the Conscience" Standard from *County of Sacramento v. Lewis*, As Required, to Measure Whether the Police Officers Violated A Constitutional Duty Owed to Protect the Plaintiff from Harm After His Release from Custody.

Legal Argument II: The Court below Has Created a New, Unfunded Federal Mandate to Treat Intoxicated Suspects As Having a Constitutional Right to Continued Detention That Will Have Profound Budgetary Consequences, and This Mandate Invades the Sovereignty of the States.

Legal Argument III: The Sixth Circuit Court Decision Will Prevent Municipalities from Relying upon Police Officers to Engage In Legitimate Law Enforcement Efforts to Detain and Move Intoxicated Persons Engaged in Disorderly Conduct, While Choosing Not to Incarcerate Them in a Jail After Their Arrest.

Legal Argument IV: The Court below Did Not Properly Find That The Defendants Had No Qualified Immunity Because the Constitutional Duty Owed Was "Clearly Established" in 1994.

OPINION BELOW

The Sixth Circuit's opinion in *Davis v. Brady*, is published at 143 F.3d 1021 (6th Cir. May 8, 1998).

STATEMENT OF RELEVANT FACTS

This Court may review the facts in the Petition and Opinion in the Court below. The Petition discusses the relevant statutory and constitutional provisions, and the jurisdiction of this Court to hear this case.

PROCEDURAL POSTURE OF THE CASE

This case came to the Court of Appeals for the Sixth Circuit on an interlocutory appeal raising a qualified immunity defense. The District Court had denied the defendant police officer's motion for summary judgment. The Sixth Circuit's opinion reviewed what "the record can reasonably be read to show" about the Plaintiff's claim that whether "the defendant officers took the affirmative act of restraining Davis's freedom to act on his own behalf, and consequently imposed upon themselves a duty to ensure that they were not placing him in danger." (Appendix to Petition, App. 7a.) The Sixth Circuit affirmed the District Court's decision denying qualified immunity based upon the deliberate indifference standard as follows:

> In this case, the taking of Davis into custody triggered the defendant officers' duty to protect Davis [and] . . . the defendant officers violated this duty when they exhibited deliberate indifference to Davis's well-being by abandoning him, in his inebriated state, on an unfamiliar, dark, and busy highway. (Appendix, App. 12a-13a.)

The defendants could not discuss the holding of *County of Sacramento, et al. v. Lewis, et al.*, ___ U.S. ___, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (May 26, 1998) in their Petition for Rehearing En Banc on May 21, 1998, since this

Court issued its decision in *Lewis after* the Petition was due to be filed. F.R.A.P. 28(j) bars filing supplemental briefs after an opinion has been issued by the Circuit and after the petition for rehearing has been filed. However, there is no reason why the Sixth Circuit should have ignored the holding of *Lewis*. The entire Sixth Circuit was reconsidering its Opinion in this case for an entire month after this Court issued its decision in *Lewis* on May 26, 1998. After giving the issues consideration on the Petition for Rehearing, the Sixth Circuit issued an order denying the rehearing motion on June 29, 1998. (Appendix, App. 23a.) Even in its order denying rehearing, the Sixth Circuit did not consider the new legal standard announced in *Lewis*.

Accordingly, the Petitioners filed their Petition seeking to have this Court grant certiorari and to vacate the published opinion of the Sixth Circuit because it conflicts directly with published decisions of this Court, including *Lewis, supra* and *DeShaney v. Winnebago Soc. Service,* 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989). Your Amicus Curiae file this Brief in support of the Petition for a Writ of Certiorari.

STATEMENT OF REASONS FOR REVERSAL

***Legal Argument I*: The Court Failed to Apply the "Shocks the Conscience" Standard from *County of Sacramento v. Lewis*, As Required, to Measure Whether the Police Officers Violated A Constitutional Duty Owed to Protect the Plaintiff from Harm After His Release from Custody.**

The Sixth Circuit Court applied a legal standard fundamentally at odds with the holding of *County of Sacramento, et al. v. Lewis, et al.*, ___ U.S. ___, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (May 26, 1998), ***before*** the Sixth Circuit denied the pending motion for rehearing in this case. Accordingly, there can be no dispute that the Sixth Circuit had a duty to apply that standard here before it denied the defendants' petition for rehearing. Instead of doing

so, the Sixth Circuit Court disregarded this Court's decision in *Lewis*, and never took into account any of the legitimate law enforcement objectives pursued by the defendant police officers in this case in deciding if they owed a duty to hold Davis in continued custody.

In *Lewis*, this Court held that the conduct of police officers in failing to protect a person from harm by third parties must be "arbitrary in a constitutional sense." To decide if it is a constitutional violation, *Lewis* teaches that the police officer's conduct must be measured in light of "any substantial countervailing interest [that might] excuse the State from making provision for the decent care and protection of those it locks up . . . ", and from preventing the suspect upon release from custody from coming "into harm's way." *Lewis*, ___ U.S. ___, 140 L. Ed. 2d 1045, 1061. Further, the *Lewis* decision states that, when there are substantial countervailing law enforcement or other interests served by releasing the suspect from custody, mere deliberate indifference by the police officers to the needs or safety interests of the suspect are not enough to show that a constitutional duty is owed to protect the suspect from harm. *Id.*

The Sixth Circuit failed to take into account in its opinion the legitimate law enforcement objectives that the defendant police officers pursued by releasing Mr. Davis far from the county jail and the nearby homeless shelter. Mr. Davis made it clear to both of the defendants that it was his stated goal to return to the shelter and break out the rest of the windows of the building. As the Petition states,

> When Officer Murphy went to retrieve Mr. Davis from the county jail holding cell, he asked Davis where he wanted to go. Davis replied, ***"Take me back to the mission and I'll break out the rest of the windows." SM, at 80, 86.*** . . . The officers drove Davis away from the area of the mission and left him off at the lighted entrance to Bluebell Beach, a public park. Petition for Certiorari at 5. (Emphasis added)

The defendant police officers thwarted the stated intent of the Plaintiff to continue his criminal conduct by taking him far enough away from that area to prevent further crime. Inexplicably, the Sixth Circuit Opinion fails to take into account the fact that the defendants were pursuing legitimate law enforcement objectives by releasing him some distance from the shelter. The Sixth Circuit faulted the defendant police officers for releasing Mr. Davis in Genesee Township, rather than at the jail:

> "In the present case, Davis alleges – and the record can reasonably be read to show – that after taking Davis into custody, the defendant officers dropped Davis off on a dark, busy highway and left him there ***against his will***. In so doing, the defendant officers took the affirmative act of restraining Davis' freedom to act on his own behalf, and consequently imposed upon themselves a duty to ensure that they were not placing him in danger." (Sixth Circuit Opinion, Appendix to Petition, App. 7a.)

The Sixth Circuit then disregarded the fact that the police officers exercised discretion to remove Mr. Davis from the area near the homeless shelter. Instead, the panel decision makes a finding that the police officers had no right to "interfere" with the stated intent of Mr. Davis to return to the shelter upon his release. The decision states: "the defendant officers in this case placed Davis in a more dangerous situation than he was in prior to their ***interference***, when they drove him outside the Flint city limits and abandoned him on a dark and dangerous highway in an unfamiliar area." (Sixth Circuit Opinion, Appendix, App. 9a.) (Emphasis added.) This conclusion cannot be supported under this Court's decision in *Lewis, supra* or *DeShaney, supra*.

The police have a right to stop a criminal from engaging in continued acts of destroying property. It should shock this Court's sensibility that the Court below would treat an action by two police officers to prevent a homeless shelter from having its windows broken out as an

interference of the vandal's civil rights. Then the Sixth Circuit concluded that the Fourteenth Amendment Due Process Clause imposes a duty on the defendants to protect Davis *only because of the fact that he was placed on the road against his will.*

The record simply does not support the conclusion that Davis wished to be kept in custody or to be released in any other particular place. It is undisputed that Davis only asked to go to the shelter to continue breaking out windows. The police had a legal duty to thwart this wish by him. Davis did demand that he be released from custody from the moment of his initial arrest. This is a typical situation where the police must manage the unruly and often violent behavior of an intoxicated suspect who wishes to be free and is uncooperative during his entire detention.

The Court analyzed the police officers' duties to hold Mr. Davis, rather than release him, under a "deliberate indifference" standard. By applying the "deliberate indifference" standard, the Court applied the wrong legal standard. The Sixth Circuit is again on the wrong side of a split in the Circuits, as this Court explained in *Lewis*, ___ U.S. ___, 140 L. Ed. 2d at 1061.

The new constitutional duty created by the Sixth Circuit conflicts with the decisions of this Court protecting the rights of persons being held involuntarily under a suspicion they are mentally incompetent or a danger to themselves. See generally, Michael L. Perlin, *Mental Disability Law: Civil and Criminal* (Lexis Law Pub. 1998) Vol. I at 44-188, 417-522. When the police or any state officials seek to involuntarily commit a person against their will for medical, psychological or drug treatment, this Court has consistently warned that the person enjoys a presumptive right to be set free that the officials must overcome by a preponderance of evidence showing incapacity. This Court has always said that, when the person who is involuntarily committed by a state official seeking to protect the suspect from himself, the courts must view the evidence supporting such detention by

erring on the side of releasing the suspect. See *Youngberg v. Romeo*, 457 U.S. 307 (1982); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); and, *Humphrey v. Cady*, 405 U.S. 504, 509 (1972). The police only have a duty under the decisions of this Court to restrain a mentally ill or intoxicated person, and involuntarily committing them to jail or to a hospital, to a drug treatment center or to a mental facility, when it would be obvious to anyone that the person is a danger to himself. *Id.*

The defendant police officers conformed their conduct to the holdings of these cases. They had a duty under this case law to use the least restrictive alternative form of incarceration of a person who is intoxicated or mentally ill and arrested on the street. The defendants honored Mr. Davis's wish to be freed from custody after they had decided not to hold him in jail pending any criminal charges. They were correct to do so because the evidence does not ***clearly*** show he is intoxicated and incompetent.

The Court has reversed the normal presumption that the police must err on the side of releasing a suspect who is intoxicated with only a diminished capacity who is not being held for any crime. This court should reject the equation made by the Sixth Circuit that simply because one is drunk then one is incompetent and unable to care for oneself. (Sixth Circuit Opinion, Appendix, App. 12a.) ("[The defendant officers] knew, or reasonably should have known, that Davis was drunk and unable to care for himself.") This conflicts with the decision of the Seventh Circuit in *Estate of Scott B. Stevens v. City of Green Bay*, 105 F.3d 1169 (7th Cir. 1997), holding that police officers are not charged with the knowledge of how much alcohol a suspect has consumed. Police officers on the street have no way to measure a suspect's blood alcohol level in most cases.

The Sixth Circuit has made the police responsible to protect Mr. Davis from himself and the dangers he created by becoming intoxicated while homeless, as well as to protect him from third parties. To impose such a broad

duty is no less than making the police officers the insurer of the safety of the suspect. This is contrary to the express holding of both *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992) (holding that municipalities do not have a duty to become insurers of the safety of municipal employees from safety risks in the workplace under the Fourteenth Amendment).

The Sixth Circuit opinion is also plainly contrary to this Court's holding in *DeShaney v. Winnebago Soc. Serv.*, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989). The basic argument of *DeShaney* applies to this situation, namely, that simply because state officials create a relationship to a foster child does not make them forever responsible to provide care to that child. In this case, Mr. Davis expressed a wish to terminate the custody relationship. In granting his wish to be released, the police had no choice but to take Davis away from the shelter where he would have returned to break the windows. To apply a duty to protect Davis is more unworkable for temporary detention situations. The holding in *DeShaney* was that there was no duty to protect the child from harms he faced before the much longer detention of foster commenced. The same holding applies here. Davis faced the same general harms that a homeless person faces who has no shelter and is intoxicated by his own acts on the street. Davis faced these dangers before his arrest and would have faced them without police intervention. This is why Joshua DeShaney was harmed: his father who had beaten him before the police intervened abused him after he was returned to his father.

DeShaney forecloses the idea that once there is a special relationship created, you cannot end it. Ending the special relationship in *DeShaney* did not create a breach of constitutional duty where the child was released to the old dangers, and it should not lead to a breach of duty here.

The Court below has held the police officers accountable and potentially liable for leaving a suspect on the road when another police officer from a different police

agency did not believe Davis was a danger to himself. The Court also held the police officers accountable for the failure of the driver of the automobile to stop in time when she had a last clear chance to do so. However, neither the other police officer nor the driver of the car that hit Mr. Davis proximately caused the injuries that Mr. Davis now suffers. He caused his own injuries by walking into the street. The Third Circuit held in *Kneipp v. Tedder and City of Philadelphia*, 95 F.3d 1199 (3d Cir. 1996), that police officers may be held constitutionally liable under Section 1983 for abandoning an intoxicated suspect released from custody near a roadside only when three conditions are met: (1) the suspect could not be released because she was physically incapacitated due to extreme intoxication, (2) the police officers have an obvious safe place to take the suspect and refuse to do so, and (3) the police officers interfere with a person who is trying to take the intoxicated suspect being arrested to a position of safety from harm. See *Kneipp, supra*.[2] In this case, none of these three conditions are met.

The record in this case only suggests that the Plaintiff was somewhat impaired due to his intoxication. This impaired condition is familiar to many people who become drunk but are not incapacitated. The police should not forcibly take such a person into custody and hold them against their will, as the Sixth Circuit decision requires. In this case, the Plaintiff was able to walk and able to stand and able to talk after the defendant police officers released him at a county park on Bray Road.

This is not a case where the Plaintiff was so clearly incapacitated when the police released him from custody that he could be considered to be medically or physically

---

[2] In *Kneipp*, the police arrested an intoxicated woman, Samantha Kneipp, just one block from her home when her husband was taking her home from the bar. The police also interfered with the wife's source of rescue (i.e her husband) by leading him to believe that she had been taken to jail.

incapacitated. For instance, it is undisputed that the Plaintiff walked from the location of his release to the front lawn of a house to talk to a resident. Davis stood and talked to Genesee Township Officer Carlson before he was hit. Davis then walked into the road waving for a ride *both before Officer Carlson arrived and after he left*.

Given these facts, the Court below should have addressed whether a reasonable police officer could make a mistake of fact as to whether the Plaintiff was so intoxicated as to be a danger to himself *in any location*.

***Legal Argument II*: The Court below Has Created a New, Unfunded Federal Mandate to Treat Intoxicated Suspects As Having a Constitutional Right to Continued Detention That Will Have Profound Budgetary Consequences, and This Mandate Invades the Sovereignty of the States.**

In its Opinion, the Court below has overlooked the fact that Davis was released because the Genesee County jail was overcrowded. The Court also overlooked in the Opinion the undisputed fact that the Plaintiff lives on the street when he is not in the shelter and, thus, he had to be released there by the defendant police officers. The Opinion below does not even mention the word "homeless" or "homeless shelter." The Court below simply asserted that the defendant police officers acted "against the Plaintiff's will" by forcing him to be released from custody on the roadside.

The Court's Opinion should have considered the three basic facts that justified the defendants' conduct in releasing Davis on Bray Road: (1) first, Davis could not be put in the county jail because it was overcrowded, and there were no alternative facilities available to take him for medical treatment or to be kept against his will in protective custody other than this jail, (2) second, Davis said that he wanted to be released from custody, rather than being held against his will at the jail, and (3) third, Davis was homeless.

These facts show why the defendants acted upon the basis of "legitimate law enforcement objectives" that this Court in *Lewis* saw to be a necessary part of the analysis of whether police officers violated a constitutional duty by conduct that "shocks the conscience." The "shocks the conscience" standard had been followed by every other Circuit before *Lewis*, except the Sixth and Ninth Circuits. *Lewis, supra.* Instead of applying the "shocks the conscience" standard, in *Lewis* and Circuit decisions before *Lewis*, the Sixth Circuit employed a result-oriented analysis and followed a deliberate indifference standard. Only by applying the wrong legal standard could the Sixth Circuit arrive at the conclusion that the defendants owed Mr. Davis a constitutional right to confinement based upon his intoxication, after his initial detention. The Court below should have found that Mr. Davis's right to be held in protective custody ended after the police decided not to hold him for any criminal offense, and after they determined that he should be released from custody at a time when he was not clearly incapacitated.

The federal courts should not be mandating every local political subdivision in America (or in the Sixth Circuit) to provide this type of social services to only intoxicated persons who have committed crimes, thereby diverting resources from foster care programs, drug treatment, food stamps, medical care for the poor, etc. This Court has explained why federal courts should not directly or indirectly override the budgetary decisions of sovereign states, and their subdivisions, by imposing directly duties under the Fourteenth Amendment or other constitutional provisions, contrary to basic notions of federalism. See *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) (invalidating Gun-Free School Zones Act of 1990 as exceeding Congress' power under the Commerce Clause).[3]

---

[3] See generally, Malcolm Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts*

The State of Michigan and its municipalities also have pursued legitimate law enforcement objectives in seeking to protect Davis from the harms he would face in an overcrowded Genesee County jail. This lawsuit arose because the Genesee County Sheriff concluded that Davis should not be admitted as an inmate because the county jail was overcrowded. This is a very common situation in county jails in municipalities across the county. The population of local county jails (where most inmates are held for petty crimes) has increased in size three-fold in just twenty five years – and there is no end in sight to the constantly increasing numbers of inmates that police bring to the doors of these jails. Wayne Walsh explains the magnitude of the problem in his study *Counties and Court: Jail Overcrowding and Court Ordered Reform*, as follows:

> Chronic Overcrowding in the nation's city and counties [the 1993 Senate Crime Bill]. Even if new prisons were to fractionally reduce overcrowding, the 20th Century has taught us two lessons well: New prisons fill up almost as soon as they open, and there are always several offenders standing in line to take the place of each one who is temporarily removed from the streets.
>
> * * *
>
> * * * * Jails in the United States have been overcrowded and characterized by poor living conditions virtually since their inception. Recent massive increases in jail populations (from 158,394 in 1978 to 444,584 in 1992) have only magnified such longstanding problems * * * * Wayne Walsh, *Counties and Court: Jail Overcrowding and Court Ordered Reform* (Temple University Press, Philadelphia 1995) at 5-7.

The Sixth Circuit did not consider the impact of vesting the Plaintiff with a new constitutional right to be

---

Reformed America's Prisons (Cambridge University Press 1998), Chap. 5, 149-203.

held in custody in local county jails. These jails are run by local municipal governments and they are chronically overcrowded already.

The Michigan Legislature has sought to stem the tide of constantly increasing jail populations by mandating that county governments control the size of the jail population. See County Jail Overcrowding Emergency Powers Act, M.C.L. 801.51 et seq., M.S.A. 28.1758(1) et seq. The Michigan Supreme Court upheld the power of the legislature to pass this statute in an effort to avoid liability for municipal governments:

> [T]he Legislature has an interest in helping the state and its employees avoid liability when possible [and] . . . past experience has shown that conditions arising from jail and prison overcrowding can lead to suits against jail and prison officials brought by prisoners under 42 U.S. Sec. 1983 for violation of their civil rights. * * * * The Legislature, through the jail overcrowding act, is seeking to **prevent** violations of prisoners' Eighth and Fourteenth Amendment rights. When we consider that many of the prisoners in county jails have yet to be convicted, the state must be solicitous of their rights while they are still protected by the presumption of innocence. The act provides bright-line guidance to the courts and sheriff when the likelihood of Eighth and Fourteenth Amendment violations become imminent. . . . A threatened injury is enough to justify action." See *Kent County Prosecutor*, 428 Mich. 314, 326, n.12, 409 N.W.2d 202, 208, n.12 (1987).

The Supreme Court of Michigan also pointed out that the Jail Overcrowding Act was passed to comply with decisions of this Court. In its Opinion in the *Kent County Prosecutor*, the Court observed how this Court had "highlighted the horrendous environments which overcrowded [jail] conditions create" by quoting from Justice Brennan's opinion in *Rhodes v. Chapman*, 452 U.S. 337, 354, n.3, 101 S. Ct. 2392, 2403, n.3, 69 L. Ed. 2d 59 (1981). *Id.* at n.7. To

avoid these unconstitutional conditions of confinement, the Michigan Jail Overcrowding Act mandates catastrophic measures to be taken when the county sheriff fails to control the admissions to the jail.

The Genesee County Sheriff was following the general mandate of the Jail Overcrowding Act when his deputies decided in this case not to accept the Plaintiff for admission to jail. See *Muskegon County Commissioners v. Circuit Judge*, 188 Mich. App. 270, 469 N.W.2d 441, 445 (1991) (approving of use of practice of "deter[ring] acceptance of new prisoners, with certain exceptions" as a remedy for jail overcrowding.) The Defendants in this case were not free to disregard the decision made by the Genesee County Sheriff's Deputies refusing to hold the Plaintiff in custody.

The record does not reveal that Mr. Davis wanted to stay at the Genesee County jail for his own protection. The Sixth Circuit also cannot support the conclusion that its action of leaving Davis at the entrance to a public park had the effect of "restraining Davis's freedom to act on his own behalf." (Sixth Circuit Opinion, Appendix, App. 7a.) The record contradicts this finding, as does any common sense understanding of Mr. Davis's conduct in walking around the area around the entrance of the public park after these defendant police officers released him.

***Legal Argument III*: The Sixth Circuit Court Decision Will Prevent Municipalities from Relying upon Police Officers to Engage In Legitimate Law Enforcement Efforts to Detain and Move Intoxicated Persons Engaged in Disorderly Conduct, While Choosing Not to Incarcerate Them in a Jail After Their Arrest.**

The opinion of the Court below promises guaranteed liability for police officers honestly pursuing their "instincts to fight crime", and it promises social disorder for communities asking the police to take control of public spaces. When a citizen calls 911 to complain about an intoxicated person who is menacing them on the street, the police will have only one of two choices. First, the

police could decide not to arrest the intoxicated person. **Second**, the police can arrest a person and then release him after the Sheriff who runs the county jail or the county prosecutor makes the decision not to hold him in continued detention at the jail, or not to charge him with any crime.

Given the logic of the Sixth Circuit decision, the police can be expected to make a decision not to arrest intoxicated suspects if there is no place at the jail to hold them until they are no longer in their intoxicated condition. Once the suspect is arrested, or detained or moved to another location, then the Sixth Circuit decision requires that the police face possible liability for any harms arising after the release of the suspect that could have been avoided by continued detention.

The law of unintended consequences will apply here to create an effect of imposing liability that the Court below did not anticipate. The police will not provide protection to the community as they once did by removing intoxicated persons who are threatening others, at least not where there is no room at the jail to hold that person in custody. The decision of the police not to arrest intoxicated persons who are disturbing the peace will lead to social deterioration. George L. Kellig and Catherine M. Colis have described in *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* (Free Press 1996), how the New York City, Baltimore, Seattle, and San Francisco police departments have sought to halt street disorder as part of a community-wide strategy to reclaim poor and gentrified inner city neighborhoods.[4] As Kellig and Colis document, police departments in each of these cities have been following a

---

[4] The former New York City Police Commissioner (America's "top cop") tells a similar story about his successful strategy to stop street disorder and subway crime as the key to reducing crime throughout the City. See William Bratton with Peter Knobler, *Turnaround: How America's Top Cop Reversed the Crime Epidemic* (Random House 1998).

conscious policy of seeking to stop street disorder in public spaces. They are doing so because residents, office workers, persons using a public park, riders on the subway or on city buses, and customers in stores or restaurants in inner city areas have demanded police intervention. See George Kellig and Catherine Colis, *Fixing Broken Windows, supra* at 15.

When the county jail is overcrowded, the police have nowhere to take these persons who they have arrested, detained and need to release. Under the Sixth Circuit decision in this case, the police will be held subject to suit and to being held liable under Section 1983 for performing what this Court should agree are legitimate law enforcement objectives, as defined in *Lewis*, of controlling street disorder so as to reclaim our inner cities for the majority of their citizens.

Legal Argument IV: **The Court below Did Not Properly Find That The Defendants Had No Qualified Immunity Because the Constitutional Duty Owed Was "Clearly Established" in 1994.**

The Sixth Circuit decision below recognizes that these two police officers owed a "clearly established" duty that no other Circuit opinion had recognized as of the time of the incident in November of 1994. This new constitutional duty conflicts with the law in every other Circuit. There is no other federal appellate court that has directly considered the question and held that police officers have a broad duty to protect an intoxicated person from harms created by third parties at the location where the suspect is released from custody. The only other Circuit to have specifically addressed the issue in a case involving an intoxicated person refused to hold that the police had a duty to protect the suspect after his release from the harms he caused to himself (i.e., by becoming intoxicated and then walking into the road where he was hit by a car). As the Petition points out, the Seventh Circuit explicitly refused to adopt this view in

Estate of Scott B. Stevens v. City of Green Bay, 105 F.3d 1169 (7th Cir. 1997).

The Congress adopted the laws that became the Civil Rights Act of 1871 (including 42 U.S.C. § 1983) in order to require the officials of the several states to respect the rights of persons in their jurisdictions to the protection of the U.S. Constitution and the laws.

To accomplish these statutory objectives, this Court has created an easily defined standard of when qualified immunity must be applied to bar a suit against a police officer. In *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982), this Court defined that standard by stating that because "an official [cannot] reasonably be expected to anticipate subsequent legal developments, nor [can] he fairly be said to 'know' that the law forb[ids] conduct not previously identified as unlawful, [such that] reasonable knowledge of the law involves knowledge only of legal rules that were 'clearly established' at the time of the conduct at issue." *Harlow*, 457 U.S. at 818. This Court later decided in *Anderson v. Creighton*, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987), that the question of whether a new constitutional right is "clearly established" may depend upon the level of generality at which the right is defined. The *Anderson* Court held that "the contours of the right [must be] sufficiently clear that a reasonable official would [have] understood that what he [was] doing violated that right." Both *Harlow* and *Anderson* held that a police officer must be given qualified immunity if, judging by an objective standard, a reasonable person would say that the constitutional right the official is accused of violating had not become "clearly established" at the time of the conduct.

The Sixth Circuit did not follow *Harlow* and *Anderson* since it held that the police officers owed a "clearly established" constitutional duty to the Plaintiff that no Circuit decision had recognized. There is no panel decision in the Sixth Circuit decided as of November of 1994

that clearly recognized that police officers owe a substantive due process duty to protect a suspect from harm upon release from custody. The Sixth Circuit did cite to four decisions in support of the view that this constitutional right not to be released had become "clearly established" in the Circuit. Those decisions are cited in the Sixth Circuit Opinion, *see* Petitioner's App. 6a-10a, citing *Walton v. City of Southfield*, 995 F.2d 1331, 1337 (6th Cir. 1993); *Gazette v. City of Pontiac*, 41 F.3d 1061, 1065 (6th Cir. 1994); *Foy v. Berea*, 58 F.3d 227 (6th Cir. 1995); and *Stemler v. City of Florence*, 126 F.3d 856, 867-868 (6th Cir. 1997). Three of these four decisions, including the *Gazette* decision decided in December of 1994, were published by the Sixth Circuit before the defendant police officers arrested and released Davis on November 17, 1994.

The above decisions in the Sixth Circuit do not create a "clearly established" constitutional right to protective custody or continued confinement owed by a police officer who arrests an intoxicated person. This is true under any analysis of whether the right was "clearly established" following this Court's definition of that standard in *Anderson* and *Harlow*.

There was no "clearly established" right at the time of the incident in November of 1994. The only decision on this issue that was published before the incident was *Walton*, 995 F.2d 1331, raised the issue of whether police officers violated a constitutional right owed a duty under the substantive due process doctrine to protect children from being abandoned in a car on the highway when they arrested the children's mother after a traffic stop. The *Walton* Court held that the conduct of the police officers was not clearly unlawful based upon any published decision of the Sixth Circuit in 1993, and so the Court granted them qualified immunity. Specifically, the *Walton* Court held that "the defendant officers maintain that the district court erred in denying qualified immunity to them on the claim that they abandoned the children [and] [w]e agree and reverse the district court on that issue." *Id.* at 1336, 1344.

Finally, the Sixth Circuit decision in *Walton* did recognize that this Court in *DeShaney* had held that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals," *id.* at 1336, quoting from *DeShaney*, 489 U.S. at 198, 109 S. Ct. at 1004. However, the *Walton* Court specifically declined to reach any decision about whether the police officers had violated a clearly established constitutional right owed by them to the children they abandoned on the highway after arresting their mother. The Sixth Circuit's *Walton* decision did review the decisions in the Seventh, Ninth, Tenth and Eleventh Circuits on the question of whether police officers have a "clearly established" duty to protect the personal security of suspects after their release from custody from harms created by third parties. *Walton*, 995 F.2d at 1337-1339 (collecting cases). But the Sixth Circuit concluded from this discussion that the decisions were either distinguishable on their facts or that "[these] Circuit decisions merely show that the circuits continue to be divided on the issue." *Id.* at 1339.

Obviously, the Sixth Circuit cannot rely upon *Walton* to conclude that there was a Circuit decision which "clearly established" the right of the Plaintiff to be placed in protective custody, rather than to be released on the roadside, after his arrest at the shelter. As a result, this case nicely frames an important and basic procedural issue that this Court should resolve. The question is whether a right is "clearly established" only after there is a published Circuit Court decision. Your Amicus asks this Court to use this case to hold that constitutional due process principles and fundamental unfairness are violated if these police officers are held to a standard of conduct that was not clearly established in any decision in the Circuit at the time of their conduct.

Officials should be able to know in advance when their conduct is likely to violate the Constitution or laws. Such advance warning of potential liability is not possible under a rule of liability that turns on whether the location

where an arrested person is released from custody is deemed, after the fact, to be more dangerous in some respect from the place where the person was arrested. The standard of liability created by the Sixth Circuit imposes a general duty to avoid negligence that will cause officials to be judged for their conduct by after-the-fact and wildly fluctuating standards. As this Court has recognized in *Lewis* in stating that Section 1983 was not intended to be a "font of tort law," the application of the negligence standard will catch both the most conscientious officer as the most deliberately indifferent. Such a new standard must be applied prospectively only to future cases. It is fundamentally unfair to impose liability on a state official for failing to predict future developments in the law.

CONCLUSION AND REQUEST FOR RELIEF

Your Amicus asks that this Court reverse the decision to protect the sovereign right of municipalities to make these decisions free from federal interference so as to be able to fund more worthy social programs better designed to promote the welfare of all citizens. Your Amicus also requests relief to prevent the Sixth Circuit from limiting the ability of police officers to prevent disorder in the streets of our cities, in the transit systems and in public spaces. For the foregoing reasons, this Court should vacate the decision of the Court below, grant certiorari, and then remand to that Court to issue a decision in light of this Court's recent decisions in *County of Sacramento v. Lewis, supra,* or decide the case on the merits.

Respectfully submitted,

SUZANNE CAROL SCHUELKE, ESQ.
15703 Stonehouse Circle
Livonia, MI 48154
(734) 462-4284
Counsel of Record
for Amicus Curiae
Michigan Municipal League

PATRICK L. ROSE
230 N. Washington Sq. #306
Lansing, MI 48933
(517) 482-2422
Co-Counsel for Amicus
Curiae Michigan Municipal
League

Dated: November 20, 1998